

Laboratory Furniture Midwest, Inc., and JDM & Associates, Inc., d/b/a Manpower Temporary Services and International Union, Allied Industrial Workers of America, AFL-CIO. Cases 7-CA-29599 and 7-CA-29772

February 25, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On October 25, 1990, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief. Respondent JDM & Associates, Inc., d/b/a Manpower Temporary Services, filed a cross-exception, a supporting brief, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²In light of our dismissal of the complaint, we find it unnecessary to pass on Respondent Manpower Temporary Services' cross-exception to the judge's failure to find that it was not a joint employer for purposes of Respondent Laboratory Furniture Midwest's refusal to hire alleged discriminatee Neil Carey as a full-time employee.

Richard F. Czuba, Esq., for the General Counsel.

Ernest R. Stolzer, Esq., of Mineola, New York, for Laboratory Furniture Midwest.

Louis C. Rabaut, Esq., of Grand Rapids, Michigan, for JDM & Associates.

DECISION

STATEMENT OF THE CASE

STEPHEN J. GROSS, Administrative Law Judge. Respondent Laboratory Furniture Midwest (LFM) obtains workers in two ways: (1) by hiring employees directly; and (2) through Respondent JDM & Associates, d/b/a Manpower Temporary Services (Manpower), in which case LFM pays a fee to Manpower based on the number of hours the employee works for LFM, and the employee receives his or her remuneration from Manpower rather than from LFM. Neil Carey

is the employee who is the subject of this proceeding. LFM obtained his services from Manpower.

The General Counsel contends that LFM and Manpower are joint employers; that, in response to the efforts of the International Union, Allied Industrial Workers of America, AFL-CIO (the Union) to organize LFM's employees, LFM refused to convert Carey from "a temporary joint employee" to a "regular full-time employee"; that LFM laid off Carey because Carey supported the Union and in order to discourage employees from engaging in union activities; and that both LFM and Manpower thereby violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).¹

My conclusion is that the record fails to show that either LFM or Manpower violated the Act in any respect.

I. LFM AND MANPOWER JOINTLY EMPLOYED CAREY

LFM is a manufacturer. Manpower is in the business of providing "its employees to customers on a temporary basis" (in the words of its answer). Carey received his first assignment and paycheck from Manpower in 1987. That relationship still obtained as of the date of the hearing. Since 1987 Carey has received more than 20 different assignments from Manpower (with LFM being one of those assignments). Such assignments lasted as little as a few days, as much as several months.

In March 1989 LFM told Manpower that LFM needed a break press operator. (A "break press" bends sheet metal; the bend is called a "break.") On March 21 Manpower sent Carey. Carey worked at LFM's plant until July 24, 1989. During that period, LFM personnel supervised him; Manpower personnel did not. Thus LFM supervisors told Carey what hours to work, what machines to work at, what products to produce, what standards those products had to meet, and so on. But at all times Carey received his compensation (including fringe benefits) from Manpower, not from LFM. And Manpower, not LFM, determined Carey's pay rate.

That adds up to LFM and Manpower being joint employers of Carey. See, e.g., *NLRB v. Western Temporary Services*, 821 F.2d 1258 (7th Cir. 1987); *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985); *Manpower, Inc.*, 164 NLRB 287 (1967).

II. THE ADMISSIBILITY OF AN EXHIBIT SUGGESTING ANTIUNION ANIMUS ON LFM'S PART

Laurie Ann Hilt is a Manpower supervisor. She testified in this proceeding in response to a General Counsel subpoena.

On or about August 9, Hilt visited LFM's office and spoke with an LFM office worker, Janet King. Thereafter Hilt wrote a memorandum that purported to recount what King had said about why LFM was not taking on any more employees, including whether LFM's decision not to take on any more employees was related in any way to the Union's organizing efforts.

The General Counsel offered the memorandum into evidence. I agreed that the memorandum was a business record

¹The Union filed its charges on August 22 and October 11, 1989. The complaint in Case 7-CA-29599 issued on October 18, 1989. A consolidated amended complaint issued on November 17, 1989. I heard the case in Muskegon on January 18, 1990. The General Counsel and Manpower, but not LFM, filed briefs. Both LFM and Manpower admit that they are employers engaged in commerce for purposes of the Act.

of Manpower. But nonetheless I rejected the General Counsel's offer on the ground that the memorandum's description of what King had said was inadmissible hearsay. The General Counsel has asked me to reconsider that ruling.

If the remarks that Hilt ascribed to King "concern[ed] a matter within the scope of [King's] agency or employment," then the memorandum's description of King's comments is not hearsay, and I should have allowed it to be received into evidence. See Fed.R.Evid. 801(d)(2)(D). That puts into issue the scope of King's employment.

Is King an LFM "supervisor." King is LFM's receptionist, secretary, telephone operator, payroll clerk, and keeper of LFM's personnel records. She has the authority to sign LFM checks of up to \$2500 and is one of LFM's designated cosigners for larger checks. But King possesses none of the kinds of authority that under Section 2(11) are indicia of supervisory status. I conclude that she is not a supervisor within the meaning of the Act.

Were King's alleged remarks otherwise within the scope of her employment. King often serves as a communications link between LFM and Manpower. King does not decide whether LFM needs more employees, or, if LFM's management has determined that LFM needs additional employees, whether LFM should hire those employees directly or instead obtain them from Manpower. Nor is King authorized to decide whether LFM no longer wants the services of an employee obtained via Manpower. But when LFM's management determines to obtain employees from Manpower, LFM officials routinely tell King to advise Manpower of that. As Hilt put it, King "will call Manpower and say, 'send us out a welder'" or "send three people."

When Manpower sales personnel (such as Hilt) visit LFM they try to meet with members of LFM's management. But if none are available, the Manpower agent will speak with King about LFM's needs. (That's how the memorandum in question came to be written.)

In sum, there is no doubt at all that statements by King to Manpower about LFM's needs for additional employees are within the scope of King's employment by LFM.

But the statement at issue is a remark by King to Hilt about *why* LFM was not taking on any additional personnel. And the record gives no hint that it was part of King's job to advise Manpower why LFM needed or did not need additional employees. (Indeed, as touched on above, the record suggests the reverse—that LFM's management would simply tell King to tell Manpower to "send us a welder," or the like.) Nor does the record suggest that King's position with LFM was such that she would be included in discussions by LFM supervisors about whether and why LFM should hire or get rid of employees.

Perhaps the best course would be to be lenient when evaluating scope of employment issues for purposes of Rule 801, and then consider the various available facts in determining what weight to give the testimony or documentary evidence reflecting the utterances of the employee-declarant.

But consider the situation here. At issue is a document that purports to state what a witness remembered having heard King say about why LFM was not hiring any employees. Yet the record shows that King had no hand in deciding whether to hire employees. And there has not even been any showing that persons who did make hiring decisions ever had any rea-

son to advise King of their reasons for hiring or not hiring employees.

Perhaps management did frequently tell King the reasons why LFM was going to take on new employees or refrain from doing so (even though the record fails to reflect this). Or even if that is not the case, perhaps management did tell King in this one instance (even though, again, nothing in the record shows that that is so). Or perhaps King happened to overhear something in the LFM office that no one intended her to hear. But on this record it seems at least equally likely that King's remarks to Hilt reflected only King's own theory about why LFM wasn't taking on new employees.

Under these circumstances I continue to conclude that the document marked as General Counsel's Exhibit 5 should not be admitted into evidence.

III. CAREY'S CAREER AT LFM

It takes two kinds of skills to have a break press produce properly shaped parts. One is the set of skills involved in setting up the press. The other is the skill needed to operate the press once it is set up. Of the two tasks, setting up the press is the more difficult.

In March 1989 LFM needed a break press operator who also knew how to set up a press. But such personnel are hard to find. So LFM decided to settle for someone who could operate the press and whom LFM could train to set it up. That's how Carey arrived at LFM. He did know how to operate a break press. He did not know how to set one up.

From the start LFM personnel tried to educate Carey on how to set up a break press. Carey, however, either could not or would not learn how to set up the press. That led an LFM supervisor to tell Carey, a month or two after Carey started working at LFM, that the Company was going to have to let Carey go unless he learned set-up "in the next four or five months." And even as an operator Carey's record was spotty. On occasion so much of his output was defective (and thus had to be scrapped) that some employees began to call him "Scrappy."

Then, in July, three things happened that boded no good for Carey. One was a meeting of a number of break press department supervisors and experienced employees in which management asked everyone to focus on how the department's productivity could be increased and the quality of its output improved. The persons at the meeting were invited to advise management about any employees who weren't carrying their share of the load. The second was that there was a change in the kind of work the break press department was doing. For some time the presses had been used to produce large numbers of the same items. But in July the presses began being used to produce relatively small numbers of varied items. That meant more setup work. The third was that the employees who had been setting up Carey's press for Carey were getting annoyed about having to do that.

One of the employees who attended the meeting on productivity and who had been setting up Carey's press subsequently suggested to LFM's management that the Company ought to fire Carey.

On July 24 an LFM supervisor told Carey that that was his last day with LFM. Two LFM supervisors credibly testified that LFM stopped employing Carey because he was brought in with the expectation that he would learn to set up break presses, that he never did learn to do that, and that by

July Carey's inability to set up a press meant that the Company didn't need him. (LFM continued to employ an employee who sometimes operated a break press and who did not know how to set one up. But that employee was paid less than Carey and had been hired as a "utility" employee, not as a break press operator.)

IV. WAS CAREY'S TERMINATION CONNECTED WITH THE UNION'S ORGANIZING DRIVE

The Union began an organizing drive at LFM in May 1989. Carey was not active in the Union's effort and, in fact, did not even indicate support of the Union by wearing union insignia. While Carey did sign a union authorization card, there is no evidence that management knew that. A number of LFM employees did actively support the Union, and LFM's management knew who at least some of them were. All of those employees were still employed by LFM as of the hearing date. The Union's recording secretary testified. He did not claim that LFM showed any animosity toward the Union.

Carey testified that in June he asked an LFM supervisor to be put on as a regular employee (so that he would be employed directly by LFM rather than via Manpower) and was told that LFM "wouldn't be doing any hiring until after the union dispute was settled." I do not credit that testimony. Carey testified that at about the time that LFM terminated his employment, an LFM supervisor told him that "we're going to let you go 'till the union dispute is settled." I do not credit that testimony either.

In sum, I conclude that neither union activity at LFM, nor any other protected activity, had anything whatever to do with LFM's refusal to hire Carey directly (instead of through Manpower) or with the termination of Carey's employment by LFM.

Finally, let us assume something that is not the case, namely, that the General Counsel did prove that LFM refused to hire Carey directly, and then fired him, at least in part because of the employee activity that the Act protects. In those circumstances I would nonetheless conclude that neither LFM nor Manpower had violated the Act. My basis for that conclusion: the record shows that, even had there been no protected activity, LFM would have refused to employ Carey directly and would have terminated his employment when it did.²

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed.

² See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.